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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

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The petitioners, Lieutenant Drury and Private Dowd, were and now are soldiers in the Regular Army of the United States, and on the 10th day of September, 1903, were in charge of the Allegheny Arsenal at Pittsburg, Pa.; while attempting to arrest one Crowley, a private citizen, who had just committed a felony on the Arsenal property, and who was fleeing for the purpose of avoiding arrest, Dowd fired at and inflicted a mortal wound upon Crowley, from which he died on the same evening. The State of Pennsylvania thereupon indicted these soldiers on the charge of murder in the first degree, and manslaughter, and

asserts its right through the officials of Allegheny County to place these men on trial for their lives. The Government takes the position that these soldiers at the time of the commission of the homicide were engaged in performing a duty imposed upon them by the Constitution and laws of the United States, and that the State of Pennsylvania is without jurisdiction to call these men to account in its own courts upon the claim that a crime has been committed against the laws of that Commonwealth.

THE POINT IN THE CASE.

The Commonwealth of Pennsylvania is without jurisdiction to prosecute the petitioners on the charge of murder, for the reason that the homicide was committed by the petitioners while in the discharge of a duty imposed upon them by the Constitution and laws of the United States. In re Neagle, 135 U. S., 1.

STATEMENT OF THE FACTS.

On the 10th day of September, 1903, Ralph W. Drury, one of the petitioners, was a commissioned officer of the United States Army, with the rank of second lieutenant, and had under his command a detachment of twenty enlisted men, of whom John Dowd, the other petitioner, was one, stationed at the Allegheny Arsenal in the city of Pittsburg, in Allegheny County, Pa., that arsenal being a subpost of Fort Niagara, N. Y. From time to time, before September 10, 1903, large quantities of copper down spouts and eave troughs had been stripped from some of the buildings on the arsenal grounds and the ma-

terial stolen by persons unknown to the officers in charge of the arsenal property. Other depredations had also been committed about the arsenal grounds, such as the breaking of window lights. Lieutenant-Colonel Robertson, the commanding officer at Fort Niagara, on the occasion of an inspection of the Allegheny Arsenal in July, 1903, directed Lieutenant Drury to use his best endeavors to stop the depredations and to that end ordered him to establish a patrol day and night on the arsenal grounds, and to apprehend and arrest any person or persons committing depredations on the arsenal property. We may observe in passing that in the absence of any such specific command from Lieutenant-Colonel Robertson, Lieutenant Drury and the men under him were required by section 771 of the Regulations for the Army of the United States to summarily arrest and turn over to the civil authorities for trial persons caught in the act of stealing public property.

Shortly before 10 o'clock on the morning of September 10, 1903, word was received at the Allegheny Arsenal by telephone that some persons were then engaged in stealing copper from one of the buildings on the arsenal grounds. Lieutenant Drury thereupon took John Dowd, who was then on guard duty, and another private soldier, each armed with a rifle and ammunition, and passed out of the arsenal grounds through the gate to Butler street, and the three thence proceeded by way of Butler street and Almond alley toward the Allegheny Valley Railroad. This expedition

was undertaken for the purpose of arresting the persons who were stealing copper from the arsenal buildings, as had been reported by telephone. Lieutenant Drury informed the two men who were with him of the reported stealing of copper and instructed them to continue down Almond alley and to arrest any person coming from the arsenal. Lieutenant Drury left Almond alley at the corner of Willow street and went down Willow street to Fortieth street, which runs along but outside the arsenal wall, and proceeded down Fortieth street to its foot, where were congregated three or four young men, among whom was William H. Crowley, the deceased. It appears that these young men had been engaged only a few minutes before in stealing and carrying away certain copper from one of the arsenal buildings, and that Crowley had been seen in the very act by the party who telephoned the fact to Lieutenant Drury. Crowley had thrown the copper down from the wall upon the ground, and he and his companions had sold the copper to a Jew peddler for $3 or $4 just prior to the time when the soldiers appeared upon the scene for the purpose of effecting the arrests. As soon as these young men saw Lieutenant Drury approaching, being conscious of their own guilt, one of them cried "Here comes the soldiers!" and they all fled for the purpose of avoiding arrest. They fled in different directions across the railroad tracks, and Private Dowd, observing them fleeing from the very place where the larceny had been committed, and by these

very young men, as it afterwards turned out, concluded very naturally that they were the thieves, and thereupon pursued Crowley, calling upon him to halt, four times, accompanying the call to halt the last two times with the warning that he would fire unless Crowley halted. Crowley refused to halt and continued his flight, and just as he was about to disappear between certain lumber piles and thereby escape Dowd fired, the bullet entering the left leg of Crowley from the rear and passed out in front. Crowley then turned around and came toward Dowd, who remained and assisted him to lie down. His wound was thereupon attended to by Lieutenant Drury, who had come up, and he was subsequently removed to the West Pennsylvania Hospital, where he died that evening. At the time of the shooting Drury, Dowd, and Crowley were all off the ground belonging to the United States—to wit, the arsenal property over which the United States has exclusive jurisdiction. It is clear, however, and the evidence is uncontradicted, that Crowley was one of the thieves, and was really the ringleader of a gang of thieves who were engaged in stealing Government property, and that he was so engaged in the commission of such a felony only a few minutes before the shooting; that he fled, as a thief, from the soldier who warned him to halt. The evidence further shows that the felony which Crowley had committed had been committed on the Arsenal property, a place under the exclusive jurisdiction of the United States, and the only court in which Crowley could have been pros-

ecuted for such felony was a court of the United States. It is further evident from a reading of the record that the petitioners, in attempting to make this arrest, acted in absolute good faith, believing that it was their duty to apprehend Crowley and turn him over to the civil authorities of the United States for prosecution. John Dowd, who fired the shot which resulted in the death of Crowley, has been tried by court-martial, consisting of officers of long experience, and was acquitted. That finding was in evidence before the court below. The record shows that there was absolutely no malice, either upon the part of Lieutenant Drury or Private Dowd. It equally appears that both petitioners are of excellent character, and were evidently acting in the honest belief that they were performing a duty imposed upon them by law, a duty that arose suddenly and unexpectedly upon information coming from the outside, and upon which they were compelled to act with precision and dispatch. On the 16th day of December, 1903, a true bill was returned against these petitioners in the Court of Oyer and Terminer and General Jail Delivery for the county of Allegheny, wherein they are charged with the commission of the crime of murder in the first degree and in the second count with the crime of manslaughter. They were thereupon arrested by Edward Lewis, warden of the common jail of Allegheny County, in whose custody they were under a commitment, issued out of the Court of Oyer and Terminer of Allegheny County, based upon the indictment hereinbefore

referred to, at the time they were brought before the court below at the instance of the United States on a writ of habeas corpus and certiorari, with a view to having the legality of their detention inquired into and determined.

On a hearing before the Circuit Court of the United States for the Western District of Pennsylvania, Judge Acheson held, among other things, that, inasmuch as there was a conflict in the evidence, two women having testified that Crowley was shot by Dowd after he had surrendered and while walking toward the soldier for the purpose of giving himself up, it was the duty of the court to discharge the writ and remand the petitioners to the custody of the warden, and it is to review this action of the Circuit Court that this appeal is taken.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in refusing to find the facts in connection with the killing of Crowley by the petitioner Dowd. (Rec., p. 11.)

2. The Circuit Court erred in holding and deciding that it was relieved of the duty of ascertaining and determining the facts in connection with the homicide, simply because the record discloses some conflicting testimony involving an important issue of fact, viz, as to whether Crowley was shot while fleeing to escape arrest, or whether after he had stopped and had turned around and had virtually surrendered to the petitioner Dowd. (Rec., p. 11.)

3. The Circuit Court erred in failing and refusing to find as a fact, from the evidence adduced, that William H. Crowley had committed a felony on the morning of September 10, 1903, by stealing certain property *belonging* to the *Government* from the *Allegheny* Arsenal, a place under the exclusive jurisdiction of the United States. (Rec., pp. 10, 11, 12.)

4. The Circuit Court erred in failing and refusing to find as a fact from the evidence that at the time of the commission of the homicide the petitioners were engaged in a lawful attempt to arrest and apprehend the said William H. Crowley for and on account of the felony which he had just committed, for the purpose of turning him over to the civil authorities of the United States for prosecution. (Opinion of Court, Rec., pp. 9, 10, 11, 12, 13.)

5. The Circuit Court erred in failing and refusing to find as a fact from the evidence that when the petitioners attempted to arrest the said William H. Crowley for the felony which he had just committed he fled for the purpose of avoiding such arrest, and that it was the duty of said petitioners under the laws of the United States to pursue and arrest the said Crowley for the felony which he had previously committed. (Rec., pp. 9 to 13.)

6. The Circuit Court erred in failing and refusing to find as a fact from the evidence that the petitioner John Dowd was justified in firing upon the said William H. Crowley for the purpose of effecting his arrest and that it was apparent that the said Crowley would have

escaped unless some such extreme measures were resorted to in order to effect his arrest. (Rec., pp. 9 to 13.)

7. The Circuit Court erred in failing and refusing to find as a fact from the evidence that the petitioners in attempting to arrest Crowley for the felony which he had just committed, were engaged in performing a duty imposed upon them and each of them by the Constitution and laws of the United States (Rec., pp. 9 to 13.)

8. The Circuit Court erred in refusing to hold and decide, from the evidence submitted, that the Allegheny Arsenal at the time of the commission of the homicide was a place under the exclusive jurisdiction of the United States, and that the courts of the United States have exclusive jurisdiction over the crimes and offenses committed thereon. (Rec., pp. 9 to 13.)

9. The Circuit Court erred in refusing to hold and to decide upon the facts established by the evidence that the killing of Crowley by the petitioner Dowd, in order to prevent his escape from arrest, was a justifiable homicide. (Rec., pp. 9 to 13.)

10. The Circuit Court erred in refusing to hold and to decide upon the evidence produced that the Court of Oyer and Terminer of Allegheny County, Pa., did not have jurisdiction to try the petitioners, or either of them, upon the charge of murder and manslaughter under the laws of the State of Pennsylvania. (Rec., pp. 9 to 13.)

11. The Circuit Court erred in refusing to hold and to decide under the pleadings and the testimony submitted

that the petitioners and each of them were unlawfully and illegally in the custody of Edward Lewis, warden of the common jail of Allegheny County, Pa. (Rec., pp. 9 to 13.)

12. The Circuit Court erred in refusing to hold and to decide that the petitioners and each of them were entitled to a decree discharging them and each of them from the custody of the warden of the common jail of Allegheny County, Pa. (Rec., pp. 9 to 13.)

13. The Circuit Court erred in refusing to discharge the petitioners. (Rec., pp. 9 to 13.)

POINTS, AUTHORITIES, AND ARGUMENT.

This writ of habeas corpus was issued under and pursuant to the provisions contained in section 753 of the Revised Statutes of the United States, upon the ground that the petitioners "are restrained of their liberty contrary to the Constitution and laws of the United States, and are in custody of the warden of the Allegheny County Jail for *an act or acts done by them in pursuance of the laws of the United States, and while engaged in good faith in the performance of their duty and within the scope of their authority.*" (Rec., p. 5.)

Section 761 of the Revised Statutes provides that "the court or justice or judge shall proceed in a summary way to *determine the facts of the case* by hearing the testimony and argument and thereupon to dispose of the party as law and justice require." The Circuit Court for the Western District of Pennsylvania on the 8th day of February, 1904, granted the petition for the

writ of habeas corpus, and on the same day issued its writ, directed to Edward Lewis, warden of the common jail of Allegheny County, commanding him to produce the bodies of the petitioners, together with a return of the date and cause of their detention. The return to the writ was made on the 8th day of February, 1904. (Rec., p. 7.) The return shows that the petitioners were held in custody in pursuance of a writ of commitment issued out of the Court of Oyer and Terminer of Allegheny County, Pa., based on an indictment found at the December sessions, 1903, of said court, charging the petitioners in the first count thereof of murder, and in the second count of manslaughter. The Circuit Court for the Western District of Pennsylvania thereafter, to wit, on the 22d day of February, 1904, proceeded in a summary manner to hear the testimony and argument, but, as the Government contends, failed and neglected to obey the plain and specific mandate of the statute "to determine the facts of the case * * * and thereupon to dispose of the parties as law and justice require."

The Circuit Court, in the opinion which it rendered in this case (Rec., pp. 9–13), seeks to avoid this responsibility by pointing out that there was some conflicting testimony as to whether the deceased was shot by the petitioner Dowd while fleeing to escape arrest or after he had surrendered. The court said:

> It is very clear that on a habeas corpus hearing such as this it is not competent for the court to determine upon conflicting evidence

> whether the person under indictment in the State court is guilty or innocent of the offense of which he is accused. (*Ex parte Crouch*, 112 U. S., 178, 180.)
>
> Whether the shooting of Crowley was justifiable or excusable must be determined by the State court to whose jurisdiction the petitioners are subjected. That the petitioners will be protected by that court in all their legal rights is not to be doubted.

We submit that the learned Circuit Judge failed utterly to distinguish between the case which this court had under consideration in *Ex parte Crouch* and a case which belongs to that class of cases of which *In re Neagle* is perhaps the most typical example. In *Ex parte Crouch* it was admitted that the petitioner was in the custody of a State court *of competent jurisdiction*, and held for trial upon an information for violating a criminal statute of the State. Mr. Chief Justice White, in delivering the opinion of the court, said:

> He seeks to be discharged by habeas corpus, not because, if guilty of the charge which has been made against him, the court is without jurisdiction to hold him for trial and to convict and sentence him, but because, as he alleges, he has a valid defense to the charge, which grows out of a provision in the Constitution of the United States, and, for this reason, he insists he is detained in violation of the Constitution.

In the case at bar the Government makes the claim, as was made in the case of *In re Neagle, that the State*

court is absolutely without jurisdiction to try the petitioners for the killing of Crowley, for the reason that the homicide was committed by the petitioners while in the lawful performance of a duty and obligation imposed upon them by the Constitution and laws of the United States.

The determination of the facts in the case at bar is necessary in order to ascertain whether or not the State court has jurisdiction to try the petitioners upon the charges preferred, while in the Crouch case the determination of the facts did not go to the question *of the jurisdiction of the court*, but simply to the question as to whether *the defendant had a good and sufficient defense*.

The Circuit Court for the Western District of Pennsylvania in hearing and deciding this case had one of two courses open for its decision.

First. The court might have determined from the facts in the case that the petitioners were engaged in performing an act in pursuance of a law of the United States, and that the homicide was justifiable, in which event the petitioners would have been entitled to be discharged for the reason that the State court was without jurisdiction to place them upon trial.

Second. The court might have decided from the facts in the case that the petitioners were not engaged in performing an act in pursuance of a law of the United States, from which it would follow that the petitioners should be remanded to the custody of the State authorities.

The Circuit Court, however, refused to take either

of these positions, each of which would have necessarily involved a determination of the facts, and held that it was incompetent for him to pass upon the facts, because there was a conflict in the testimony. The court's refusal, therefore, to determine the facts is equivalent to its having determined them adversely to the contention of the petitioners, and this appeal is taken for the purpose of having the court's action or the legal effect of its action reviewed by this court.

I.

United States officers and other persons held in custody by State authority for doing acts which they are authorized or required to do by the Constitution and laws of the United States are entitled to be released from such custody, and the writ of habeas corpus is the appropriate remedy for that purpose.

The Government contends that the facts in the case at bar are abundant to show that it falls properly within that class of cases in which the Federal courts will interfere to release officers of the United States and other persons from the custody of the State authorities when the alleged crimes for which they were arrested were necessarily committed in the performance of some duty or obligation imposed upon them by the Constitution or laws of the United States. It has been held repeatedly by this court that in such exceptional or extraordinary cases the person deprived of his liberty should not be required or compelled to stand a trial in the State court, and, if defeated, carry his case to the Supreme Court of the State and thence

by writ of error to the Supreme Court of the United States, but that the Federal courts will interfere *in limine* "by means of the writ of habeas corpus and in ascertain and determine the facts as to whether the officer was at the time of the commission of the offense complained of engaged in the performance of a governmental duty; and if found to be so engaged will discharge the prisoner, even though it may result in his receiving no punishment at all at the hands of the United States. (*In re Neagle*, 135 U. S., 1; *In re Waite*, 81 Fed. Rep., 359; *Ohio* v. *Thomas*, 173 U. S., 276.) It must be conceded, therefore, that the petitioners are well within their legal right in appealing to the Federal courts to be relieved from the prosecution for murder or manslaughter by the Commonwealth of Pennsylvania.

II.

The petitioners upon this appeal are entitled to have this Court examine the evidence and determine the facts in this case, and to decide whether or not these petitioners are entitled to be discharged from the custody of the warden.

In the recent case of *Storti* v. *Massachusetts* (183 U. S., 138, 143), Mr. Justice Brewer, in delivering the opinion of the court, had the following to say with reference to the duty of this court to determine the facts in a habeas corpus case in the exercise of its appellate jurisdiction:

> We do not question that rule as applied to ordinary suits and actions, but section 761, Revised Statutes, provides as to habeas corpus

cases that "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Proceedings in habeas corpus are to be disposed of in a summary way. The interests of both the public and the petitioner require promptness; that if he is unlawfully restrained of his liberty it may be given to him as speedily as possible; that if not, all having anything to do with his restraint be advised thereof, and the mind of the public be put at rest, and also that if further action is to be taken in the matter it may be taken without delay. Especially is this true when the habeas corpus proceedings are had in the courts of a jurisdiction different from that in pursuance of whose mandate he is detained. This matter of promptness is not peculiar to these cases in Federal courts, but is the general rule which obtains wherever the common law is in force. It is one of those things which give to such proceedings their special value, and is enforced by statutory provisions, both State and Federal. The command of the section is "to dispose of the party as law and justice require.". All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus.

Mr. Justice Miller, in delivering the opinion of the court in *In re Neagle* (*supra*), after referring to section 761 of the Revised Statutes (p. 42), which declares

that the court shall proceed in a summary way to "determine the facts in the case" by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require, said:

> It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress the mode of review, whether by the Circuit Court of the judgment of an inferior court or justice or judge or by this court of the judgment of a Circuit Court, the word "appeal," and not "writ of error," is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

It is unnecessary to cite further authority upon this proposition. The failure of the Circuit Court to find as a fact that Crowley had committed a felony and was killed while attempting to avoid a lawful arrest by the petitioner, Dowd, can not be urged as a reason why this court, in the exercise of its appellate jurisdiction, should not consider the evidence *de novo* and ascertain and determine therefrom whether or not the petitioners are entitled to a discharge.

III.

Only a few minutes before his death, William H. Crowley, the deceased, had committed a felony within the Arsenal grounds, a place under the exclusive jurisdiction of the United States, over which crime and the place where it was committed the courts of the United States had exclusive jurisdiction.

(*a*) *The felony which Crowley had committed.*

It appears from the uncontradicted evidence that some time during the night preceding the day on which Crowley was killed he went upon the roof of one of the Arsenal buildings, commonly described as the "L" of the smith shop, situated toward the Allegheny Valley Railroad, and ripped up and removed certain copper plates, which were left by Crowley at some point within the Arsenal grounds, to be brought forth and disposed of when the opportunity should be presented. Sometime after 9 o'clock on the morning of the 10th of September, 1903, Crowley informed one of his companions, Jerry McKenna by name, that on the night previous he had stolen off the Arsenal roof some copper, and requested another companion, Benny Kountz by name, to go and get the ragman, while he and McKenna would go after the copper. McKenna and Crowley thereupon went upon the Arsenal grounds and took the copper, which was the property of the United States, and threw it over the wall, and a few minutes thereafter sold it to the peddler for $3 or $4, Crowley receiving the money realized on the sale of the copper. It was while Crowley was upon the Arsenal wall engaged in the act of carrying away this copper from the Arsenal grounds that he

was seen by a witness of the Government, and an employee in a mill across the street, who immediately telephoned to the officers in charge of the Arsenal that some men were engaged in stealing copper from the Arsenal building. The contention of the Government is that the act of Crowley and McKenna in carrying away this copper, which had been severed and disconnected for several hours from the Arsenal building, constituted the crime of larceny, for which Crowley and McKenna could have been indicted and prosecuted on the charge of a felony in the United States District Court for the Western District of Pennsylvania. Section 5439 of the Revised Statutes, as amended by the act of March 3, 1875 (18 Stat., 479), provides in part as follows:

> Embezzlement or larceny of public property:
>
> *Be it enacted, &c.*, That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the District or Circuit Court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

It is manifest that under the facts as they appear in the record, and the law above referred to, William H. Crowley had committed a felony for which he could be prosecuted only in the courts of the United States, and that by reason of the commission of such crime he became liable to arrest, with or without a warrant, by an officer of the United States, or by a private person who knew that such felony had been committed and had reasonable grounds to believe that Crowley had committed the same. The rule at common law is that things which are annexed to the freehold of land, or are growing thereon, such as fixtures of all kinds, minerals, trees, corn, fruit, and other crops, are regarded as a part of the realty, and, by a very refined technicality, it was held at common law that it was not larceny to sever and carry them away, if the severance and the asportation were not separated by any interval of time. (1 Hale, P. C., 510; *United States* v. *Wagner*, 1 Cranch (C. C.), 314; *United States* v. *Smith*, 1 Cranch (C. C.), 475; *People* v. *Williams*, 35 Cal., 671; *State* v. *Davis*, 22 La. Ann., 77.) But if the thing was severed by the defendant and an interval of time occurred between that act and the carrying away, so that they were separate and independent acts, the subsequent carrying away *animo furandi* was held to be larceny, because by the severance the thing became personalty, and, as such, was in the possession of the owner of the land. (*Reg.* v. *Foley*, 26 L. R. Ir., 299, 17 Cox C. C., 142; *Beall* v. *State*, 68 Ga., 820; *Bell* v. *State*, 4 Baxt. (Tenn.), 426.)

It has been said that a day must intervene between the severance and the asportation to make them separate acts, for the reason that the law does not recognize fractions of a day; but the better rule seems to be that no particular space of time is necessary, the only requirement being that the two acts must be so separated as not to constitute one transaction. (*Holly* v. *State*, 54 Ala., 238; *John's case*, 3 City Hall Rec. (N. Y.), 58; *Bradford* v. *State*, 6 Lea (Tenn.), 634; *Ex p. Willkie*, 34 Tex., 155; *Com.* v. *Steimling*, 156 Pa. St., 400.)

While we are satisfied to rest our case upon the proposition that William H. Crowley had committed a felony within the meaning of the act of March 3, 1875, above referred to, and was therefore liable to arrest by the petitioners, it may not be inappropriate to direct the attention of the court to other provisions of law which certainly apply to this case if for any reason the act of March 3, 1875, should be considered inapplicable.

Section 5391 of the Revised Statutes makes provision for the punishment of offenses committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, and directs that the laws of the State in which the place is situated which were in existence at the time the United States acquired jurisdiction shall be applicable. Section 5391 of the Revised Statutes provides as follows:

> If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States,

> which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.

It will be observed that this section applies only to such offenses as are not prohibited or the punishment thereof is not specifically provided for by any law of the United States, from which it follows that if the provisions of the act of March 3, 1875, relative to the larceny of Government property does not apply to the crime which Crowley had committed in the Allegheny Arsenal property, this section, namely, 5391, does apply if there existed a law of the State of Pennsylvania making Crowley's act a felony at the time this arsenal property was acquired by the United States.

By section 1 of an act of the Pennsylvania legislature approved March 9, 1816, the Commonwealth of Pennsylvania consented to the purchase by the United States of a tract of land upon which the Allegheny Arsenal is situated as and for a military reservation; and it provided that nothing that said act contained should be construed so as to impede or prevent the execution of any process civil or criminal under the authority of the State. The act of 1816 was amended by the act of February 14, 1845, by which the Com-

monwealth of Pennsylvania consented to the purchase and acquisition by the United States of certain other real property as an addition to the Allegheny Arsenal grounds formerly acquired by the United States; and by section 2 of the act of 1845 it was provided that there should vest in the United States jurisdiction over the same and to the same extent as it had vested by the act of 1816.

By these acts of the legislature of Pennsylvania the United States acquired exclusive jurisdiction over the Allegheny Arsenal grounds, so far as the prosecution of all crimes and offenses which might thereafter be committed within such military reservation was concerned. It is true that the State of Pennsylvania by these acts of the legislature reserved concurrent jurisdiction for the purpose of serving State civil and criminal process, but such reservation in no manner interfered with the exclusive jurisdiction of the United States so far as the prosecution of crimes committed within the boundaries of the Arsenal grounds was concerned.

> In the cession to the United States by a State of land for military posts the reservation of concurrent jurisdiction to serve State civil and criminal process in the ceded place does not defeat the jurisdiction of the United States over the ceded place, and the State courts have no jurisdiction over crimes committed therein. (*United States* v. *Cornell*, 2 Mason, 65.)

Section 5391 of the Revised Statutes was enacted on April 5, 1866, at which time the Allegheny Arsenal

property had been ceded to and was under the exclusive jurisdiction of the United States. At the same time, to wit, April 5, 1866, there existed a law of the State of Pennsylvania, which Congress adopted and made a law of the United States, by the act of 1866, above referred to, which precisely covered the crime which Crowley had committed and under which he might have been prosecuted, tried, and convicted in the District Court of the United States for the Western District of Pennsylvania. That law is as follows:

> If any person shall steal or rip, cut or break, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively, fixed in or to any building whatsoever, or anything made of metal, fixed in any land, being private property, or for a fence to any dwelling house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be deemed guilty of larceny, and, being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years. (Purdon's Digest, vol. 1, p. 515, 12th edition.)

It will be observed that this law of the State of Pennsylvania, which Congress adopted by the act of 1866 and made applicable to the Allegheny Arsenal grounds, as well as all other places under the exclusive

jurisdiction of the United States, provided that the offender should be deemed guilty of larceny; and by section 148 of the Pennsylvania criminal code it was declared that if any person shall be guilty of larceny he shall, on conviction, be deemed guilty of a *felony*.

It is therefore immaterial, so far as the commission of the felony is concerned, whether we consider Crowley's act committed the night before, which consisted in ripping up and removing the copper sheeting and plates upon the roof of the blacksmith shop, or whether we consider his act committed on the morning of the 10th of September, 1903, which consisted in stealing and carrying away from the Arsenal grounds the bundles of copper sheeting, the property of the United States, which he had previously severed and detached from the roof of the Arsenal building. In committing either of these acts he was guilty of a felony under the laws of the United States, for which he could alone be prosecuted and convicted in a court of the United States. In either case the Government contends that it was the duty of the petitioners to arrest Crowley for the commission of such felony, and to surrender him to the civil authorities of the United States for prosecution. The petitioners had the legal right to arrest Crowley, which we will now consider, as well as the manner in which they attempted to make such arrest.

IV.

The arrest.

(*a*) *Prior depredations.*

The record discloses that prior to the 10th day of September, 1903, many depredations of a similar character had been committed by persons unknown upon the Arsenal grounds and buildings at the Allegheny Arsenal, of which Lieutenant Drury had charge and control as an officer of the United States Army. These depredations had been so numerous and so flagrant as to be brought to the attention of Maj. E. B. Robertson, commanding officer of Fort Niagara, N. Y., of which latter place the Allegheny Arsenal was at that time a subpost. When Major Robertson visited the Allegheny Arsenal, in January, 1903, Lieutenant Drury pointed out to him the condition of the various buildings at the Allegheny Arsenal and specifically called his attention to the fact that certain parts of these buildings had been removed, including downspoutings, eaves troughs, etc. In the month of July, 1903, Major Robertson again visited the Allegheny Arsenal and, finding that these depredations were still being committed, directed Lieutenant Drury to establish a patrol of the guard, and gave instructions to him to send the sentinel of the guard on this patrol, and, if possible, to apprehend and arrest any person or persons committing depredations on the Arsenal property, and to use any force that should be necessary in order to keep and preserve the public property in his charge.

(Record, pp. 53, 54, and 55.) This is important for the purpose of showing that the commission of crimes similar to the one which Crowley committed on the 10th of September, 1903, were known to the officers and men in charge of the Allegheny Arsenal property, and that their superior officers had imposed upon them the specific duty of arresting all persons who might be engaged in the commission of such depredations.

(*b*) *In the absence of any specific law upon the subject, the petitioners were charged with the duty of arresting persons guilty of stealing Government property under their custody.*

In the case of In re Neagle (135 U. S., 1), this court repudiated the contention asserted by the minority that an officer of the United States could not justify an act performed by him as having been performed in pursuance of a law of the United States, unless he was able to point out some specific law authorizing him to perform the act drawn in question. In the Neagle case it was admitted that there was no specific law of the United States which imposed upon Neagle the duty of protecting Justice Field from assault and possibly from assassination, but this court held that such a duty did rest upon the deputy marshal, and was properly inferrible from the Constitution and the laws of the United States. Mr. Justice Miller said:

> In the view we take of the Constitution of the United States, any obligation fairly and

> properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

We therefore assert that, even in the absence of any specific law imposing the duty and obligation upon the petitioners to arrest persons guilty of stealing property of the Government from the Allegheny Arsenal, such duty nevertheless was imposed upon them by the Constitution and laws of the United States just as effectively as though there existed a specific law of Congress authorizing and requiring them to make arrests in such cases.

(c) *At the time of the commission of the homicide there existed a specific law of the United States under which these petitioners were acting in making the arrest of Wm. H. Crowley.*

The regulations for the United States Army, published by direction of the President of the United States, on the 1st day of May, 1901, contains the following provision with reference to the arrest by the

troops of persons caught in the act of stealing public property:

> SEC. 771. Upon satisfactory information that such United States property, unlawfully in the possession of any parties, is likely to be taken away, concealed, or otherwise disposed of before the necessary proceedings can be had in the civil tribunals for its recovery, the post or detachment commander will at once cause the same to be seized, and will hold it subject to any legal proceedings that may be instituted by other parties. *Persons caught in the act of stealing public property will be summarily arrested by the troops and turned over to the civil authorities for trial.* (Army Regulations, p. 107.)

As to the responsibility of officers of the Army in permanent or temporary command of a post or station for the security of all public property in their custody or under their control, the court is referred to sections 739, 740, 764, and 766 of the Army Regulations for 1901.

The specific authority for such regulations, if such authority be found to be necessary, will be found in section 161 of the Revised Statutes, which provides as follows:

> The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The question may be asked as to what effect section 771 of the Army Regulations has upon ascertaining what is the duty of troops of the United States with reference to arresting persons caught stealing Government property. It has been held frequently that such regulations lawfully prescribed by one of the executive departments of the Government has the force and effect of law. As was said by Judge Thayer in delivering the opinion of the court in the case of *Campbell* v. *Waite* (88 Fed. Rep., 102, 106):

> It was also decided *in re Neagle* (135 U. S., 1, 75, 10 Sup. Ct., 658), where most of the foregoing cases were cited and approved, that no act done in pursuance of a law of the United States lawfully enacted can be an offense against the laws of a State, and that an act done in obedience to rules or regulations lawfully prescribed by one of the executive departments of the Government, or in obedience to the directions of one of the heads of such departments, acting within the scope of his authority, is to be regarded as an act done in pursuance of a law of the United States, although no statute of the United States has in express terms directed the doing of the act.

(*d*) *If the laws of the United States imposed upon these petitioners the duty to arrest Crowley for the felony which he had committed, they were justified in making use of whatever force was necessary for the purpose of performing such duty, even to the extent of firing upon Crowley, if in no other way he could be apprehended.*

At common law and under the decisions of the courts of the United States there seems to be a well-recognized distinction between the powers and duties of peace officers in making arrests without a warrant and the powers of individual citizens to make such arrests. This distinction seems to rest upon the fact that, in certain cases at least, the private person is simply *permitted* by the law in making arrests, while in the case of a peace officer the duty of making the arrest is enjoined upon him.

We take the position that the petitioners in arresting Crowley were performing a duty enjoined upon them as officers of the United States, and that the law applicable to arrests made by officers without a warrant is applicable to and protects these petitioners just as effectively as though they had been peace officers or deputy marshals of the United States.

The petitioners at the time of making this arrest were in uniform and armed under the authority of the United States, not only for the purpose of protecting Government property in their custody and control, but specifically charged with the duty of arresting all persons caught in the act of stealing such property; from which it follows that the duty rested upon them to pursue

and arrest the felon upon reasonable grounds for belief that Crowley had committed the offense, which he had in fact committed and which was known to the petitioners.

It is only fair and proper to assume that these petitioners had knowledge of the law applicable to their rights and duties with respect to the arrest of felons who had stolen Government property under their custody and control. The proposition of law for which we are here contending finds support in the common law in the works of all the authors and text-book writers upon the subject and in the decisions of courts, both State and Federal.

1. THE COMMON LAW RULE.

Sir William Blackstone, in discussing the rights of peace officers to arrest without a warrant, says:

> And in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may, upon probable suspicion, arrest the felon, and for that purpose is authorized to break open doors and even to kill the felon if he can not otherwise be taken; and if he or his assistants be killed in attempting such arrest it is murder in all concerned.—(IV Blackstone, p. 292.)
>
> See also II Hale, P. C., pp. 88, 89.

Sir Michael Foster, whom Blackstone has styled as a very great master of the Crown law, in his work entitled Foster's Crown Cases, page 271, says:

> What hath been said with regard to bare flight in a proceeding merely civil is equally

true in the case of a breach of the peace or any other misdemeanor short of felony. But where a felony is committed and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the party fleeing is killed, where he can not be otherwise overtaken, this will be deemed justifiable homicide, for the pursuit was not barely warrantable, it is what the law requireth and will punish the willful neglect of. I may add that it is the duty of every man in these cases quietly to yield himself up to the justice of his country, and for this reason it is that flight alone upon a charge of felony induceth a forfeiture of goods, though the party upon his trial may be acquitted of the fact, for he hath done what in him lay to stop the course of public justice.

The following cases upon examination will be found to bear a very close analogy to the facts of the case at bar, and in which the proposition of law here contended for is distinctly recognized:

Rex v. *Geo. Howarth.* Moody's Crown Cases, Vol. III, p. 207.

The Queen v. *Dadson.* Denison's Crown Cases, Vol. II, p. 35.

Regina v. *Murphy.* Crawford & Dix's Circuit Cases, Vol. III, p. 20.

See also

I East's Pleas of the Crown, p. 298.

I Hale, p. 481.

Rex v. *Finnerty.* I Crawf. & Dix C. C., p. 167.

I Hawkin's, p. 881.

I Russ. Crimes, p. 666.

Mr. Wharton, in his work on criminal law, Vol. III, section 2928, gives a very clear explanation of the decision of the court in *The Queen* v. *Dadson* (*supra*). He says:

> Thus in a remarkable English case, a constable was held not to be justified in shooting at a man whom he had seen stealing wood growing in a copse (which is, when a first offense, only a misdemeanor, though for a second offense, after a conviction, a felony), although the constable had no means of arresting the culprit without firing, and although the latter had been previously convicted of the same offense, the constable not being aware of such prior conviction. The question here was whether the constable had to his own mind probable cause; and as he had not, the attempt to arrest without warrant was held illegal.

In the case at bar, however, the soldier Dowd knew that the stealing of Government property was a felony, and had been informed by his superior officer, Lieutenant Drury, when they left the Arsenal grounds, that some persons were then engaged in stealing Government property from the roof of the Arsenal buildings. When he reached the place where the felony was alleged to have been committed, he saw these young men, and when they saw him they fled, and upon being called upon four times to halt, Crowley still continued his flight, from which we submit that the petitioner, Dowd, had reasonable grounds to believe that he had committed a felony, as was the fact.

2. THE OPINIONS OF AUTHORS UPON CRIMINAL LAW.

Sheriffs, constables, officers of the police are not only authorized to arrest public offenders without warrant, but are required to do so if there be reasonable ground for suspicion. For all offenses committed in the presence of an officer this power is claimed, though for past offenses the power is limited to cases of felony and breaches of the peace. In the latter cases, however, it is the duty of the officer to begin at once the pursuit of the person charged with the offense, provided, only, that there be reasonable ground of suspicion. (Wharton on Criminal Law, Vol. III, section 2927.)

If a man is committing a felony and an officer, for instance, attempts to arrest him, yet he runs away, and the officer calls on him to stop, then, if he will not stop, the officer is justified in shooting at him to compel him to stop; but, if the offense is a misdemeanor, he has no right to take this extreme measure. (Bishop's Criminal Procedure, Vol. I, section 159. See also Bishop's New Criminal Law, Vol. II, section 648.)

3. THE DECISION OF THE COURTS.

In all cases where this question has come clearly before the courts for adjudication, the principal of law has been recognized that in those cases in which a felony has in fact been committed, although not in the presence of the officer, and the officer has reasonable grounds to believe a certain person to have committed the felony, the peace officer has resting upon him

the obligation to arrest the suspected party even without a warrant, and that if he flees from such arrest the officer would be justified in firing upon him if the felon could not be apprehended without resorting to such extreme measures.

Conraddy v. The People. 5 Parker (N. Y.), 234, 241.

The plaintiff in error was indicted for the murder of Paul O'Neil, and was convicted for manslaughter in the fourth degree and sentenced to imprisonment for one year in the penitentiary of Kings County, N. Y. The plaintiff in error was a police officer, who had arrested the deceased without a warrant and shot at him and killed him at the time he was escaping from his custody. The Supreme Court of the State of New York, in affirming the conviction, said that there was no evidence of a commission of a felony, and in course of the opinion announced the rule of law in cases of homicide committed in making arrests for felony, as follows:

> The prisoner, although an officer, was acting without a warrant. No warrant had been issued by or to any one against the deceased. Nor had he committed any offense in the view or presence of the officer. Under such circumstances, to justify taking life, even if the jury were satisfied of the necessity of the homicide to prevent an escape, it must be shown that a felony had actually been committed. The distinction is marked between cases of misdemeanor and of felony. It is only in the latter that a homicide is justifiable by any person

> acting without a warrant, even when it is the only means to prevent the escape of the criminal. When no warrant is out for the offender, even an officer can not take his life to prevent his escape upon his own belief of the commission of a felony, however reasonable ground he may have for such belief. If he act without a warrant, he must be prepared to show the fact of the felony, in order to justify taking the life of a person whom he is endeavoring to arrest or to secure.

Commonwealth v. Long. 17 Pennsylvania Superior Court Reports, p. 641, 647.

This case was decided by the Superior Court of Pennsylvania in 1901. The defendant, on the night of February 11, 1900, being a tenant farmer residing in North Cornwell Township, shot and killed one John Becker, a burglar, while the latter was escaping from the defendant's house. The Superior Court reversed the judgment of conviction, and in the course of the opinion took occasion to lay down the law of the State of Pennsylvania, which was held to be simply declaratory of the common law, relative to the right of an officer or a private citizen to arrest a fleeing felon. The court said:

> One who is seen to commit a felony must be arrested on the spot or suffered to escape. So, though not seen, yet if known to have committed felony, and thereupon pursued, he may be arrested, with or without warrant, by any person. These are principles of common law

essential to the welfare of society, and not altered or impaired by the constitution. (6 Binney, 318; *Wakely* v. *Hart*, 6 Binney, 316.) When a party may be lawfully arrested for felony, and he knowing the cause, flies, so that he can not be taken otherwise than by killing him, the constable pursuing him will be justified in killing him; or a private person will, in like manner, be justified if he can prove that the deceased was actually guilty of a felony. (1 Archbold's Pr. & Pl., 29; 2 Am. & Eng. Ency. of Law (2d ed.), 884, and cases there cited.)

On the commission of a felony, a private person making fresh pursuit on reliable information may arrest the felon. It is the law not only of England, but of this State, any private person that is present when a felony is committed is bound by the law to arrest the felon on pain of fine and imprisonment if he escape through the negligence of the standersby, and they may justify the breaking open the doors upon following such felon; and if they may kill him, provided he can not be otherwise taken, it is justifiable, though if they be killed in endeavoring to make such arrest, it is murder. (*Brooks* v. *Commonwealth*, 61 Pa., 352.)

There seems to be a striking analogy between the case at bar and the case of *Commonwealth* v. *Long*. David S. Long, at the time of the homicide, did not know as a positive fact that Becker had in fact committed a felony. He had, however, reasonable grounds for the belief that the person whom he saw fleeing had committed a felony in his house, and it

afterwards turned out that such a felony had in fact been committed by Becker. Long, without even calling upon Becker to halt, fired upon him and killed him. Nor does it appear from Long's testimony that he was attempting to arrest him for a felony. Long stated in his testimony: "I shot to stop him because he was in my house; I shot to stop him, to mark him, to find out who he was; I thought he was a robber and went through my house; so I could find out who he was; I could not give him notice so as to stop him, he would have gotten behind the house and behind the trees a few feet distant from the house; he was going from me on a dead run." So, in the case at bar, the petitioner Dowd, at the time of the homicide, did not know positively that Crowley had committed a felony. He had been informed by Lieutenant Drury that some persons were engaged in stealing copper from the Arsenal buildings. He suddenly came upon Crowley, and the other young men who were with him, near the Arsenal wall, in the immediate vicinity of the place where he had been informed that the stealing was going on. These young men fled immediately upon seeing the soldier. They were conscious of their guilt and knew that the soldier was going to arrest them. The petitioner Dowd called upon Crowley four times to halt, which he refused to do, and only fired upon him when it was apparent that he could not otherwise have been apprehended.

Such was the law of the State of Pennsylvania at the time of the commission of this homicide, and such

is the law as declared by the courts of the States generally where the question has been up for judicial determination. We therefore submit that the petitioner Dowd was justified, under all the facts and circumstances of the case, in firing upon the felon Crowley for the purpose of effecting his arrest, and that the court of Oyer and Terminer of Allegheny County is without jurisdiction to try the petitioners on the indictment which has been found against them in that court.

The following list of authorities will be found to recognize the principles of law applicable to the arrest of felons for which we are here contending:

Brish v. *Carter et al.* 57 Atlantic Reporter, p. 210 (Md.).

State ex rel. Olson v. *Leindecker.* 97 Northwestern, p. 972 (Minn.).

Brooks v. *State.* 39 Southwestern Reporter, p. 877 (Ga.).

People v. *Glennon.* 74 New York Supplement, p. 794.

Kirk & Son v. *Garrett.* 84 Maryland, p. 383.

People v. *Hochstin.* 73 New York Supplement, p. 626.

Stapely v. *Commonwealth.* 6 Binney (Pa.), p. 316.

Brooks v. *Commonwealth.* 61 Pennsylvania, p. 352.

United States v. *Fuellhart.* 106 Federal, p. 911.

V.

The decision of the Circuit Court.

The Circuit Court for the Western District of Pennsylvania, in addition to the error which it committed in refusing to pass upon the conflicting evidence, thereby denying the petitioners the rights to which they were entitled under section 761 of the Revised Statutes, entirely misconceived the purpose of the provisions contained in the Fifty-ninth Article of War. That article provides as follows:

> When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.

The Circuit Court held this article of war to be a distinct recognition by Congress of the general jurisdiction in time of peace of the civil courts of a State

over persons in the military service of the United States who are accused of a capital crime or of any offense against the person of a citizen committed within the State, citing *Coleman* v. *Tenn.* (97 U. S., 509, 514). This proposition has never been questioned, so far as we know, but we are unable to see what possible application it can have to cases similar in character to the case at bar. Had Lieutenant Drury and Private Dowd committed the crime of manslaughter, or any other crime against the laws of the State of Pennsylvania, while outside the military reservation and at a time when they were not engaged in performing a duty imposed upon them by a law of the United States, they would clearly be amenable to prosecution at the hands of the civil authorities of the State of Pennsylvania, and under the Fifty-ninth Article of War they would have been surrendered to the State authorities for prosecution. It is quite apparent that the learned judge who heard this case in the court below failed to recognize this obvious distinction. The Fifty-ninth Article of War never contemplated that an officer of the United States who performed an act while engaged in the prosecution of an official duty imposed upon him by a law of the United States should ever be called to account in a State court to answer to a State tribunal for the manner in which he had performed such duty. The Fifty-ninth Article of War was, therefore, never intended to cover such a case as the one which was presented to the court below for consideration, and it seems to us

to be very clear that the court below fell into grievous error in failing to distinguish those exceptional cases, of which the case at bar is a typical example, wherein the State courts are without jurisdiction to proceed under the authorities which we have heretofore cited.

VI.

The evidence in the case is conclusive that Crowley was wounded while fleeing from arrest.

All the witnesses who saw the shooting testified that the petitioner Dowd fired upon Crowley while he was fleeing from the soldiers, with the exception of the two witnesses Mrs. Hannah Long and Mrs. Elizabeth Sherm. (Rec., pp. 203–207.) These two women testified positively that Crowley had turned around and was facing the soldier Dowd at the time the shot was fired. This evidence is in direct conflict with the evidence of every other witness who saw the shooting, and the testimony of these women in other particulars shows that it is entirely unreliable and untrustworthy. The testimony of the physicians who made the post-mortem examination shows beyond all doubt that the shot was fired while Crowley was fleeing from Dowd. Doctor McFarland, who testified for the Government, in describing the wound said: "The bullet entered at the back and came out in front, just above the crease in the buttock, coming out in the front part of the thigh and that the wound in front was probably 2½ inches lower than in the rear;" and Doctor McFarland further testified that such a wound could not have been

inflicted if the man had been facing the person who fired the shot; and the doctor further testified that Crowley himself told him that he, Crowley, was fleeing from the soldier when he was shot, and that after he was shot he turned and walked toward the man until he sank down upon the ground. (Rec., p. 49.)

Doctor Howarth, a witness called for the United States, testified that the bullet entered the thigh at the fold between the swell of the buttock and the commencement of the thigh proper, and that the exit of the wound was about 3 inches below what is termed Poupart's ligament, corresponding very closely to the fold in the front of the thigh, between the thigh and the commencement of the abdomen; that is, about 3 inches below that line. Doctor Howarth also testified that the wound at the point of entrance had a punched-out appearance, perfectly round, and the tissues seemed to be indriven, whereas at the point of exit there was a larger aperture and torn with the tissues protruding. (Rec., pp. 51–52.)

While it is true that there was conflicting testimony as to whether Crowley was shot while fleeing from the soldier or after he had turned around for the purpose of surrendering and submitting to arrest, it is equally true that when all the evidence in the case is considered there can not exist even a reasonable doubt in the mind of an unprejudiced person that Crowley was shot while fleeing from arrest, and the petitioners were clearly entitled to have the court below so find the fact to be. The Circuit Court therefore erred in refusing

to find what was the fact upon this point and in holding that because there was a conflict of testimony he was relieved of the duty of deciding the case as law and justice require. The court's refusal to determine the fact was the legal equivalent of holding that Crowley was shot by the petitioner Dowd after he had surrendered, and we submit that such a finding is not justified by the evidence, which shows the contrary fact to have been established, viz, that Crowley was wounded while fleeing from the soldier.

As to all the other material questions of fact in this case, the evidence in behalf of the petitioners was substantially uncontradicted. We contend, therefore, that this case must be decided upon the established fact that Crowley met his death while attempting to escape arrest by a soldier of the United States, who was attempting to arrest him for a felony which he had shortly before committed on property under the exclusive jurisdiction of the United States. To these facts must the law of the case be applied, with a view to determining whether the homicide was criminal or justifiable.

VII.

The petitioners contend that even though this court should decide that Dowd used more force in attempting to make the arrest than he was warranted in using under the law, nevertheless since he was engaged in performing a duty imposed upon him by a law of the United States, the State courts of Pennsylvania are without jurisdiction to call him to account for the excessive use of force in performing a duty which the Federal laws commanded.

By this proposition we do not mean to assert that this homicide would have been justifiable had it been committed by the petitioner Dowd after Crowley had submitted to arrest and had surrendered himself into the custody of the soldier. Had the soldier fired upon Crowley under such circumstances the claim that he was engaged in performing a duty imposed upon him by a law of the United States would be unreasonable and without any foundation to support it, for the reason that the arrest would then have been an accomplished fact. Neither do we claim that an officer legally in charge of a prisoner after an arrest has been effected could justify an unreasonable assault upon his prisoner upon the theory that it was committed while he was engaged in performing a duty, viz, maintaining his custody of the prisoner under a law of the United States. Such hypothetical cases are extreme, but serve to illustrate the demarcation between the two classes of cases which we are attempting to differentiate. If a prisoner in charge of a United States marshal should commit acts showing a purpose upon his part to escape, the marshal would unquestionably be justified in using sufficient force to retain his

custody and control of the prisoner; and if he should use greater force than the law would seem to justify in performing such a duty, he certainly could not be called to account in the courts of a State for such excessive use of force. If, on the other hand, without any color or warrant whatsoever for the use of force upon a prisoner in his custody or control, a marshal should assault him or do him great bodily harm, I apprehend that the law is such that the marshal would be amenable to the State courts for such an offense, for this reason, that in such a case it would be palpable that the marshal did not commit the acts complained of in the performance of a duty imposed upon him by a law of the United States, and were he to make such a claim, the Federal court hearing the case would be compelled to decide that such a claim was merely a pretext and of no avail to the protection of the marshal from the prosecution in the State courts.

The remarks of Judge Kane in the case of *Ex parte Jenkins* (2 Wall., Jr., 543), which are quoted with approval by Mr. Justice Miller in the case of *In re Neagle*, seem to have an important bearing upon the proposition here advanced:

> It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them (in the State court), will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these

> prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the Government, either State or Federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis* while the case is at bar. It is made ineffectual at any time by the discharge on habeas corpus. * * * And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating them.

In the leading case of *In re Waite* (81 Fed. Rep., 359) decided by Judge Shiras in the Northern District of Iowa in 1897, the precise question which we are here considering was brought to the attention of the court by the attorneys who appeared in behalf of the respondent. Judge Shiras in his decision entered into an exhaustive discussion of the point raised and expressed his views in the following language:

> In effect, the State court undertook to punish the examiner under the provisions of the State statutes for acts done by him as an agent of the United States, the acts being intended to further the duty imposed upon the examiner by the laws of the United States, upon the ground that in doing the acts the examiner exceeded the authority conferred upon him by the laws of the United States. It is not questioned that if a

person who is an officer or agent of the United States commits a felony in a matter aside from that committed to his care as an officer of the United States he may be prosecuted therefor in the State courts, but in such case he is not proceeded against as an officer or agent of the United States. If, however, he is proceeded against for acts done in his official capacity on the theory that what he did was not required in the performance of his duty, but was in excess thereof, then it is clear that the vital question is the extent of the authority conferred upon him by the laws of the United States, and it certainly is the law that the officers and agents of the United States, such as the marshals, the deputy marshals, post-office inspectors, pension examiners, and the like, can not be called to account before the courts of the States for the manner in which they perform the duties intrusted to them. Suppose it were true that the examiner in this case, in his efforts to get at the truth with regard to the Andrus claim, did threaten Andrus that if he did not own up to the fraud charged against him he would be prosecuted for perjury or other crime. What right has the State of Iowa to inquire into the mode or manner in which the United States, through its officers and agents, administers the pension system of the United States? If the examiner, while conducting the investigation into the validity of the claim preferred by Andrus, may have overstepped the limits he should have observed in the examination of Andrus (which, however, I do not assert nor believe), it is for the Government of the

> United States to call him to account, and not for the State of Iowa. It is true that when in the State of Iowa the officers and agents of the United States owe obedience to the laws of the State, but they, in common with all others, owe obedience to such laws only in matters to which the State laws are properly applicable.

Applying this reasoning to the case at bar, we concede that if the petitioner Dowd, who was an officer and agent of the United States, had committed a felony in the performance of some act aside from the performance of his duty as an officer of the United States, he could have been prosecuted therefor in the State courts of Pennsylvania. If, on the other hand, the petitioner Dowd while attempting to arrest the fleeing felon Crowley, as it was his duty to arrest him, under the laws of the United States, and in making such arrest overstepped the limits which he should have observed under the laws of the United States, it is for the Government of the United States to call him to account and not the State of Pennsylvania. The distinction seems to rest upon this proposition: Was the officer in good faith fairly and reasonably endeavoring to perform a duty or obligation imposed upon him by a law of the United States? If he was so engaged, and went beyond the strict line of his legal power and authority in performing such duty, the United States and not the State would have jurisdiction to call him to account. If, on the other hand, an officer of the United States should commit an act which would constitute an offense under the State

laws, and upon being charged with the commission of a crime before the State tribunals, such officer should plead that at the time of the commission of the crime charged he was engaged in performing a duty imposed upon him by a law of the United States, the bare assertion of such fact upon the part of the officer would not be sufficient to protect him from a prosecution at the hands of the State. In such a case the Federal court would be called upon to investigate the facts by means of the writ of habeas corpus, and if it were made to appear that there was not the least color or foundation in fact to support the plea of the officer the Federal court hearing the case would undoubtedly remand the officer to the custody of the State authorities to be by them dealt with according to law.

It is respectfully submitted that the decision of the United States Circuit Court for the Western District of Pennsylvania should be reversed and the said court be directed to enter an order discharging the petitioners and each of them from the custody of the warden of the common jail of Allegheny County.

MILTON D. PURDY,
Assistant to the Attorney-General.

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Supreme Court of the United States.

No 126.—October Term, 1905.

The United States ex rel. Ralph W. Drury and John Dowd, Appellants, *vs.* Edward Lewis, Warden of the Common Jail of Allegheny County, Pennsylvania.	Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

[January 2, 1906.]

Ralph W. Drury and John Dowd were indicted in the Court of Oyer and Terminer for the county of Allegheny, Pennsylvania, on two counts, the first charging them with murder, and the second with manslaughter, in the homicide of one William H. Crowley, September 10, 1903. They were admitted to bail in the sum of $5,000 each, and having been subsequently surrendered, obtained a writ of *habeas corpus* from the Circuit Court of the United States for the Western District of Pennsylvania. The case on the hearing was thus stated by Acheson, J., holding the Circuit Court:

"On September 10th, 1903, Ralph W. Drury was a commissioned officer of the United States Army, of the rank of second lieutenant, and had under his command a detachment of twenty enlisted men, of whom John Dowd was one, stationed at Allegheny Arsenal, in the city of Pittsburgh, in Allegheny County, Pennsylvania, this arsenal being a subpost of Fort Niagara, New York. From time to time before September 10th, 1903, some copper down spouts and eve troughs had been stripped from some of the buildings on the arsenal grounds and the material stolen, and other depredations, such as the breaking of window lights, had been committed on the arsenal property. Lieut. Col. Robertson, the commanding officer at Fort Niagara, on the occasion of an inspection of Allegheny Arsenal, in July, 1903, had directed Lieutenant Drury to use his best endeavors to stop the depredations, and to that end ordered him to establish a patrol of the guards day and night upon the arsenal grounds, and to apprehend and arrest any person or persons committing depredations on the arsenal property. Shortly before 10 o'clock on the morning of September 10th, 1903, having received word that some persons were stealing copper from one of the buildings on the arsenal grounds, Lieutenant Drury took John Dowd, then on guard duty, and another private soldier (each of the latter being armed with a rifle and ammunition), and, passing out of the arsenal grounds through the gate on Butler street, the three proceeded by way of Butler street and Almond alley towards the Allegheny Valley Railroad. Drury informed the two men of the reported stealing of copper and instructed them to continue down Almond alley and to arrest any person coming from the arsenal. Drury himself left Almond alley at the corner

of Willow street and went by Willow street to Fortieth street (which runs along but outside of the arsenal wall), and proceeded down Fortieth street to its foot, where were congregated three or four half-grown boys or young men, among whom was William H. Crowley, aged about 19 or 20 years. These persons fled in different directions when they saw Lieutenant Drury approaching. Crowley ran from the foot of Fortieth street away from the arsenal property in the direction of Forty-first street, keeping on or near the Allegheny Valley Railroad. When he was about one hundred yards from the arsenal wall Crowley was shot by Dowd, who aimed and fired his rifle at Crowley. At the time of the shooting, Drury, Dowd, and Crowley were all off the ground belonging to the United States. Each one of the three then stood either upon a street of the city, on the Allegheny Valley Railroad, or on private property. The rifle ball struck Crowley's left thigh, inflicting a mortal wound from which he died on the evening of the same day—September 10th, 1903.

"Thus far the facts are not open to dispute under the testimony. But as to the circumstances attending the shooting of Crowley the evidence is conflicting and leads to opposite conclusions of fact as one or other version of the affair given by the witnesses is accepted. Dowd testifies, and the petitioners have produced other evidence tending to show, that as Crowley fled he was called on several times by Dowd, who followed him, to halt, with warning that unless he halted Dowd would fire; that Crowley did not halt, but continued his flight, and to prevent his escape behind or through a lumber pile Dowd fired, and that Drury did not order Dowd to fire, and was not connected with the shooting save by the fact that he ordered the arrest of any person coming from the arsenal. On the other hand, two witnesses who were present (Miss Terwillerger and Mrs. Long) testify that before the shot was fired Crowley stopped, turned around facing the pursuing soldier (Dowd), threw up his hand, said, 'Don't shoot,' 'I will come back,' or 'I will give up,' and that just then Lieutenant Drury said 'fire,' and Dowd fired the shot that killed Crowley. The testimony of at least one other witness tends to corroborate the account of the transaction given by the two named women as above recited. It is not for me to say whether or not the witnesses who have testified thus on the part of the Commonwealth are mistaken.

"In view of all the evidence herein, should this court interfere to prevent the trial of the petitioners upon the indictment in the State court, take the petitioners out of the custody of the authorities of the State, and discharge them finally without trial by any civil court in the regular administration of justice? This is the question which confronts me." 129 Fed. Rep. 823.

The court entered an order discharging the writ and remanding petitioners to the custody of the warden of the jail of Allegheny County, and from that order this appeal was allowed and prosecuted.

Mr. Chief Justice FULLER delivered the opinion of the Court:

In *Baker* v. *Grice*, 169 U. S. 284, 290, an appeal from the final order of the Circuit Court of the United States for the Northern District of Texas, in *habeas corpus*, it was said:

"The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241; *Whitten* v. *Tomlinson*, 160 U. S. 231. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S. 372, and *In re Neagle*, 135 U. S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the State court."

The rule thus declared is well settled and, in our judgment, it was properly applied in this case. Crowley was a citizen of Pennsylvania, not in the service of the United States, and was killed in or near a street of the city of Pittsburgh, and not on property belonging to the United States or over which the United States had jurisdiction.

The homicide occurred within the territorial jurisdiction of the Court of Oyer and Terminer, which, as Judge Acheson observed, was the only civil court which could have jurisdiction to try petitioners for the alleged unlawful killing, and the indictment presented a case cognizable by that court.

The general jurisdiction in time of peace of the civil courts of a State over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the State, is, of course, not denied.

But it is contended on behalf of the Government that the State court was absolutely without jurisdiction to try petitioners for the killing of Crowley, because the homicide was committed by them "while in the lawful performance of a duty and obligation imposed upon them by the Constitution and laws of the United States." The argument is that Crowley had been guilty of the crime of larceny and could have been indicted and

prosecuted on the charge of felony in the District Court of the United States under section 5439 of the Revised Statutes, or under section 5391, the United States having jurisdiction over the Allegheny Arsenal property and the Pennsylvania laws making what Crowley is alleged to have done a felony. Hence that it was the duty of petitioners to arrest Crowley and to surrender him to the Federal authorities for prosecution. And it is insisted that the fact is "established that Crowley met his death while attempting to escape arrest." But there was a conflict of evidence as to whether Crowley had or had not surrendered, and it is conceded that if he had, it could not reasonably be claimed that the fatal shot was fired in the performance of a duty imposed by the Federal law, and the State court had jurisdiction.

The Circuit Court was not called on to determine the guilt or innocence of the accused. That was for the State court if it had jurisdiction, and this the State court had, even though it was petitioners' duty to pursue and arrest Crowley, (assuming that he had stolen pieces of copper,) if the question of Crowley being a fleeing felon was open to dispute on the evidence; that is, if that were the gist of the case, it was for the State court to pass upon it, and its doing so could not be collaterally attacked. The assertion that Crowley was resisting arrest and in flight when shot was matter of defense, and *Ex parte Crouch*, 112 U. S. 178, is in point.

We have repeatedly held that the acts of Congress in relation to *habeas corpus* do not imperatively require the Circuit Courts to wrest petitioners from the custody of State officers in advance of trial in the State courts, and that those courts may decline to discharge in the proper exercise of discretion. We think that discretion was properly exercised in this case.

Final order affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.